

The University of Chicago

STATE ADJUSTMENTS TO THE
FEDERAL CONSTITUTION, 1789-1800

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF HISTORY
JUNE, 1940

By
FRANK L. ESTERQUEST

CHICAGO, ILLINOIS

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INTRODUCTION

Historians have long given comprehensive attention to the struggle over ratification of the federal Constitution. The controversies in every state have been examined in all their phases. In fact, the origins of the movement for a more perfect union are usually explained by citing commercial regulations, legal tender laws, and other sovereign actions by the thirteen governments. But historians have halted abruptly the perview of the states at 1788 and have turned sharply the direction of their research and interest. After ratification, full and undivided attention is given to the federal government. The last sentence of one chapter in almost every history explains why the Federalists triumphed in the various states; and the first sentence in the next chapter introduces the problem of organization faced by the new government.¹

It is as though once a state had ratified, nothing else was required of it. No doubt the main question had been settled, but, regardless of its importance, no more than a theoretical acceptance of the new order of things was thereby achieved. The more perfect union envisioned by the framers in Philadelphia had to await the practical steps by which the provisions of the Constitution were put into effect. Most historians recognize the federal aspect of this problem and have carefully examined each step by which the central government implemented the provisions of the Constitution. They have given scrutiny to the progress of the judiciary, departmental, and financial bills through Congress. But entirely ignored have been the steps by which the states gave up those functions which the federal government took over. If the sovereign acts of the states up to 1788 deserve the attention they have received, certainly it is strange that their termination be considered irrelevant.

A complete adjustment of the states into the Union could

¹Nearly every history, including those by Hildreth, Schouler, McMaster, Von Holt, Channing, Hicks, Schlesinger, Morison and Commager, and McLaughlin, has a chapter headed, "Launching the New Government," "Inauguration," or a similar title immediately following the chapter on ratification. The occasional interpolation here on social life is not an integral part of the organization.

not have been effected all at once. Not only was there friction over the interpretation of many power-conveying provisions--that is, questions over states rights--but numerous explicit terms of the Constitution created problems and required adjustments within the states. An instance of this is the transfer of the power to impose customs duties from the state governments to that of the Union, a transfer which at one blow deprived most states of their chief source of revenue. Thus, even if the states had been completely willing to abide by all the clear and manifest provisions of the Constitution, there nevertheless would have had to be a period of transition during which the sovereign acts of the states came to an end.

Such complete acquiescence by the states presupposes that the angry virulent opposition of the Anti-Federalists was immediately quieted by ratification and was completely dispelled. It is true that when the vote of the state conventions went against them, many Anti-Federalists declared that they would bow to the will of the majority. Thus, as Christopher Gore related, the minority members of the Massachusetts convention had publicly declared that they would go home and support the Constitution to the utmost of their abilities and influence.¹ Abraham Clark, the leading Anti-Federalist in New Jersey, likewise announced that he would not oppose the Constitution and would not refuse to serve under it.² Although Patrick Henry had led the Virginia opposition to ratification and for some time after 1788 continued to urge a second convention, nevertheless, he disapproved of a group who planned to obstruct the operation of the Constitution.³ One of the leading Anti-Federalists of Pennsylvania, William Findley, defended in 1796 his past conduct by declaring that in spite of his opposition to the new government, he had never attempted to hinder the establishing of it.⁴

¹George Thatscher, "Selection of Papers," Historical Magazine, 2d ser., VI (1869), 269.

²New York Daily Advertiser, Feb. 8, 1789.

³William Wirt Henry, Patrick Henry, II (New York: Charles Scribner's Sons, 1891), 412.

⁴William Findley, History of the Insurrection in the Four Western Counties of Pennsylvania in the Year, M.DCC.XCIV. (Philadelphia: Samuel Harrison Smith, 1796), p. 257.

In rebuttal, there can be set alongside these verbal assurances of good will toward the new document many illustrations of continued resentment and fear. In April, 1789, Richard Henry Lee writing Samuel Adams referred to the hot-headed, deceitful Federalists in a way that leaves no doubt but that Lee remained unconverted.¹ That Adams himself had not fully accepted the national features of the new Constitution is indicated by Jeremy Belknap's comment to Paine Wingate regarding him. "You will see in the Speech wch [*sic*] our new Lieut. Governor made at his investiture that he has not thrown off the old idea of 'independence' as an attribute of each individual State in the 'Confederated Republic.'" ²

In Maryland an Anti-Federalist contended that the ratification by the state was not final, because the state constitution was thereby altered and hence required the sanction of two successive General Assemblies.³ George Bryan and other Anti-Federalists of Pennsylvania uniformly declared the necessity for far-reaching amendments; and that those put forth by Madison were not considered satisfactory is indicated by Bryan's reference to them as Machiavellian in deception.⁴ A regenerated Anti-Federalist of Massachusetts wrote to George Thatcher, "Your old friend Thompson says he will oppose it [the Constitution] as long as he has a hand to move unless 13 States Comes [*sic*] in to the Measure."⁵ A minority in the Massachusetts legislature sought to amend the General Court's answer to the governor's message so as to remove an expression acclaiming the Constitution and its framers and sought also to elect the Anti-Federalist Elbridge Gerry instead of Hancock to the executive chair.⁶

¹Library of Congress, MSS Div., Papers of Samuel Adams, Photostats from the Collection in the New York Public Library, Vol. XVIII, Lee to Adams, Apr. 15, 1789.

²"Belknap to Wingate, May 29, 1789," Boston Public Library Bulletin, 4th ser., IV (1922), 356.

³Edward S. Delaplaine, The Life of Thomas Johnson (New York: Frederick H. Hitchcock, 1927), p.452.

⁴Burton Alva Konkle, George Bryan and the Constitution of Pennsylvania, 1731-1791 (Philadelphia: W. S. Campbell, 1922), p.349.

⁵Thatcher, "Papers," Hist. Mag., 2d ser., VI, 271.

⁶Samuel Bannister Harding, The Contest Over the Ratification of the Federal Constitution in the State of Massachusetts, ("Harvard Historical Studies", II [Boston, 1896]), 105f.

Finally, we have the testimony of Thomas Jefferson at the end of 1789, three weeks after his arrival in the United States. To his successor at Paris he wrote, "The Gentlemen who opposed it [the Constitution] retain a good deal of malevolence toward the new Government." ¹

Charles Beard makes this sustained breach between the Federalists and Anti-Federalists a premise in his hypothesis that Jeffersonians and Hamiltonians originated not after the inauguration of Washington but during the ratification controversy. ² John Marshall in his biography of Washington well expresses the situation, "The agitation had been too great to be suddenly calmed; and that the active opponents of the system should immediately become its friends, or even indifferent to its fate, would have been a victory of reason over passion." ³

Many historians have pointed out that both Federalists and Anti-Federalists undertook to send men in agreement with their respective points of view to Congress. The friends of the Constitution were successful and, as is generally known, set about clothing the skeleton of the Constitution with the flesh and sinews of an authoritative and vigorous government. But for every federal act which replaced a state law, for every one of Hamilton's financial measures, there had to be corresponding action within the states. And it must be noted, Anti-Federalist majorities continued in several of them. For at least a short time, Patrick Henry dominated the Virginia legislature. In 1789, George Clinton was to remain governor of New York for six more years. John Hancock and Samuel Adams were to serve as chief executives in Massachusetts until 1797. No decided revolution by the electorate took place in North Carolina or Rhode Island. In general Anti-Federalists continued to occupy after 1789 the same major or minor posts in the states they had held in 1787 and 1788. Thus they were in position to forestall, if they so determined, the adjustments the states were called upon to make.

¹Thomas Jefferson, Writings, ed. Paul L. Ford (New York: G. P. Putnam's Sons, 1895), V, 136. In April, 1790, he informed Lafayette that the opposition had almost disappeared (*Ibid.*, p.151).

²Charles A. Beard, Economic Origins of Jeffersonian Democracy (New York: Macmillan Co., 1915), p. 85.

³John Marshall. Life of Washington, V (Philadelphia: C.P. Wayne, 1807), 176.

But problems were encountered even when there was a willingness to bring state activities into conformity to the Constitution. The course to be taken was difficult to chart since no blueprint existed for the guidance of legislators and administrators. One school of thought argued that laws banned by the Constitution required no repeal. Pointing to the sixth article of the federal document which declares that the "Constitution, and Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," its adherents reasoned that all unconstitutional provisions on the statute books were void and that no action by the states was required to expunge them.

A second group held to the thesis that some definite act was needed to bring contravening laws to an end, if only to indicate the states' favorable disposition toward the new government. New Hampshire's legislature twice appointed committees to determine which laws were "repugnant to the Constitution of the United States" so that they might be repealed. State constitutional clauses in conflict with the federal government were cited by those advocating new constitutions in several states.

A third theory advocated not that specific statutes be repealed, but held that obsolete acts were invalidated by legislative acceptance of compilations of laws which excluded acts repugnant to the federal Constitution.

Regardless of how state laws were to be brought into conformity--and in fact all three methods were practiced-- another question demanded an answer. At what time did unconstitutional state laws terminate? No date was generally accepted in 1789 for the Constitution to become effective. Plausible dates were September 17, 1787, when the Convention finished its work; June 21, 1788, when the ninth state ratified, fulfilling the requirement set forth in the seventh article of the Constitution; March 3, 1789, set by the Confederation Congress for the establishing of the new government and decreed by the Supreme Court a generation later as the time the Constitution became effective; and finally, the dates of each state's ratification. But because the reason for prohibiting certain types of state legislation was to avoid interference with federal enactments, the majority of state leaders in 1789 argued that most of the state laws could continue in effect until Congress acted. The general absence of the adjective "exclusive"

in the clauses of the Constitution which delegate powers to Congress bolstered their point of view.

The following pages summarize the adjustments the states made to some forty-five problems created by the new plan of government. Each generalization is based on the actions of all thirteen states so that citations to specific sources are not possible.

Used in the study were all the papers of the Treasury Department and the domestic records of the State Department, which are preserved in the National Archives. The correspondence with customs collectors still retained in the Treasury Department was consulted. The Force Transcripts, other papers originating in the states, and miscellaneous federal records, including a few Post Office items, were found in the Library of Congress, Manuscript Division. Federal and state constitutions and laws were investigated; laws enacted between 1785 and 1795 were examined chapter by chapter. Legislative journals, published state and federal documents, and court reports furnished additional official material. The issues for the years 1788, 1789, and 1790 of at least one newspaper in each state except Delaware were read. Later issues were consulted on specific topics. The papers of the leaders of the period, contemporary pamphlets, almanacs, and registers complete the list of sources upon which the following summary is based.

While monographs on various topics touch upon the subject incidentally, careful search has revealed but two previous investigations traversing the field of this study. One is an unsigned article in the Rhode Island Historical Society Publications of 1900 which recognizes the problem and examines phases of the transition in Rhode Island. The second is a doctoral dissertation written at the University of Pennsylvania about 1909. Its title, The Transitional Period, 1788-89, in the Government of the United States,¹ suggests that it covers the first years of the transition. Unfortunately, as its reviewer points out, "the monograph hardly meets the expectation aroused by the title, preface, and opening paragraphs of the introduction."² The extreme emphasis given one topic dwarfs the rest of the study. Only twenty-one of the one hundred and six pages of text concerns matters other than the first elections. The accuracy of this study ought not to go unmentioned.

¹Frank Fletcher Stephens, The Transitional Period, 1788-1789, in the Government of the United States (Columbia, Mo.; E.W. Stephens Co., 1909).

²American Historical Review, XVI (Jan., 1910), 421.

STATE ADJUSTMENTS

Federal and State Officers

After their conventions had adjourned, the first eleven states to ratify the Constitution could not wait passively for the new government to go into operation; if such had been the case no Congress could have met. The selection of senators, presidential electors, and representatives required state action. There was no delay; after the Confederation Congress announced that the new plan would go into effect, each state, except Georgia, made some provision at the first session of its legislature. Georgia tarried until its second.

Since the Constitution is meager in prescribing regulations for elections, each state formulated its own, and wide variation resulted. Some representatives were elected by districts and others at large; both of these methods had modifications. Majority vote was required in some states, a plurality in others. The question involved in the choice of senators was whether the legislature should name them by joint or concurrent vote. Both methods were used. The presidential electors were named by the people in some states; in others the legislature chose them; in two, both citizens and legislators had a voice; in New Jersey, the governor and Council appointed them. Wherever the legislature was given a voice in the selection of these offices the issue of joint or concurrent voting had to be settled. The states giving the people some voice in the selection had to decide between election by districts, at large, or by a combination of both. The two houses of the New York legislature split on the issue of joint as against concurrent voting and failed to choose any electors; for the same reason her senators were not named until July, 1789. In the ten states choosing presidential electors eight different methods were used to select the men who were to vote for George Washington.

By 1800, the states had in practice, though not in theory, placed a qualification, in addition to those enumerated in the Constitution, for holding the various federal offices. Dual

office holding under the two governments came to be prohibited in all the states except Rhode Island and Massachusetts. Since eighteenth century politicians preferred state to federal posts, this prohibition had the effect of reducing the number of persons who were available for service under the United States. Accepted from the beginning in the South where it was based on the theory that the two governments ought to be kept separate, the principle soon expanded throughout the middle states. In New England the question was debated fully before decisions were reached in individual cases. Opponents of dual office holding in that area usually based their contention on an argument seldom raised in the South--that departments ought to be kept separate; that is, a Congressman might be a state legislator, but he could not be governor or a judge. In the early years, Massachusetts, Connecticut and New Hampshire followed a wavering course, but the two last named states outlawed the practice of dual office holding by 1796.

The individual state officers were frequently called upon by federal administrators for informal assistance. Co-operation was usually very prompt, except by Governor George Clinton of New York who adopted what might be termed "delayed compliance."

The first Congress set forth the wording of the oath which the Constitution required of all state officers. Although there was some individual delay in taking the oath, there was no organized opposition except in North Carolina, where an entire session of the legislature elapsed without its members complying with the measure. Most state oaths in existence at the time were incompatible with the federal one, in that they declared the commonwealth to be "sovereign" and "independent." Five legislatures, calling attention to this anomaly, expunged these words within the first two years. Four others which were faced with the problem delayed taking action, but by 1822 all state oaths had been brought into conformity with the federal norm.

Federal Property

The Constitution authorized Congress to exercise exclusive jurisdiction over a seat of government not more than ten miles square and over other property used for federal purposes and secured with the consent of the state wherein it lay. Five states--New Jersey, Virginia, and those lying between them--offered ten-mile-square areas early. In addition, various communities sought

to influence Congress in their favor. After Congress had selected the site on the Potomac, Maryland and Virginia not only ceded the land and jurisdiction, but also advanced sums of money for the erection of public buildings. New York City and Philadelphia both tried valiantly to make the stay of the federal government in their communities pleasant. Money was spent on accommodations for Congress, and in each place a house for the President was planned. Pennsylvania seconded the efforts of her chief city, but New York state officially remained indifferent.

In August, 1789, Congress voted to take over the maintenance of the eleven or twelve lighthouses then in existence if the states would cede them within a year. Six states readily complied, but the Congressional act had to be extended for yearly periods six times in order to secure the laggard grants. When Congress requested that sites be ceded for new lighthouses, the response was much more prompt. Massachusetts, first, and soon almost all the states, qualified the conveyance of jurisdiction by retaining the right to serve state writs within the ceded area. Although the federal government is assigned exclusive jurisdiction over ceded areas by the Constitution, Congress after a time accepted the conditional grants, realizing that otherwise federal property might become asylums for state fugitives. Samuel Adams disapproved of the cession of land to Congress for lighthouse purposes even though qualified in this way.

The Lighthouse Act had provided that Congress would assume all charges beginning August 15, 1789, but lack of money as well as the absence of administrative agencies made this impossible. To avoid a period during which the beacons would be dark, Washington requested the states to continue their operation and to advance necessary funds. The first federal payment appears to have been made in December, 1789.

Judicial Arrangements

One of the greatest factors making for the success of the Union under the Constitution has been the enforcement of its law through courts authorized and established by the federal government. The extent and power of this national judiciary have not been unchallenged. Even in the twentieth century states have hesitated before accepting decisions of the Supreme Court. That honest disagreement over the powers of the federal courts should

arise during the period of transition is not surprising. Actually, such controversies were less frequent than might be expected, and those arising were usually settled in short order.

Scarcely any objection was voiced when the federal judiciary was assigned all cases of admiralty and maritime jurisdiction. Most of the state admiralty courts came to an end without any acts providing for their abolition. All the judges, except Benjamin Nicholson of Maryland, stepped down without argument; five received other judicial appointments. In general, the transition was accomplished smoothly, although the re-allocation of non-admiralty matters which had been assigned these courts caused some perplexities.

The states revealed but little antagonism toward the new federal courts. Judicial review was accepted even in a Rhode Island stay-law case. In a few instances, notably one in each of the Carolinas and one in Pennsylvania, transfer of suits from state to federal courts aroused opposition. In most of the controversies the federal courts yielded. In the 1790's, state benches accepted without protest fields of jurisdiction bestowed by Congress and helped to enforce federal law. On the whole, there was a surprising lack of conflict.

Only on one judicial subject was there united opposition; that was against the theory that individuals could institute suits against states in federal courts. Of the five states which were sued, Maryland alone seems to have been willing to submit. The others objected and denied that the Constitution granted the federal courts such jurisdiction. After the Supreme Court in Chisholm v Georgia established that it would hear such cases, legislative resolutions against the court's ruling began pouring into Congress. The tenor of the resolutions was in ratio to the states' concern in the matter; those not sued either ignored the issue or calmly suggested an amendment; those sued denied heatedly the constitutionality of such suits and demanded a constructive amendment. The legislature of Georgia, against whom judgment was rendered, considered a bill providing capital punishment for anyone attempting to carry out the court's decision. Congress responded to the resolutions by proposing the twelfth amendment. Within a year a sufficient number of states had ratified it to put it into effect. Delay in notifying the federal government of the action of the states, however, caused three years to elapse

before the President informed Congress of its adoption.

Judicial adjustments were made with uncommon good grace. The states generally accepted the new arrangements with a liberal, open-minded attitude. On the other hand, the federal government seldom was jealous of its judiciary powers, frequently permitting the states concurrent authority. The latter continued their statutes against counterfeiting and treason, which were also crimes under federal law. Upon the request of Congress that sheriffs be instructed to receive federal prisoners, all the states but Georgia enacted the requisite measure within the year. Georgia took no action before 1800.

Military Affairs

Not until there was threat of war in 1794 did the federal government begin building fortifications for the common defense. Then the frantic efforts to protect the coast required co-operation on the part of the states. In general the local authorities responded, although at times they raised questions as to expediency and method. The greatest difficulty was experienced in Massachusetts where the legislature delayed four years before ceding an island desired by the federal engineers. The reason for the delay was two-fold: (1) if turned over to the United States, the prison on the island could no longer be used by the state, and (2) there existed in Massachusetts a feeling which was well expressed in a newspaper letter, "Let us . . . not be too lavish in surrendering our territory to Congress."

Before federal fortifications were erected and for some years thereafter, the defense of harbors depended upon state forts. Only New Hampshire and South Carolina seem to have considered the maintenance of these to be contrary to constitutional provisions. The other states continued to garrison them, and the federal government raised no objections. Once because of political expediency John Hancock declared that the practice was unconstitutional. When the federal attorney-general's opinion was requested concerning a Pennsylvania fort, his reply was evasive. No other views on the subject could be found.

The constitutional provision allowing the states to train and discipline the militia according to rules prescribed by Congress did not work well. States qualified their observance of the Congressional measures in various ways. Their attitude when

enacting statutes to reorganize their militia according to the federal law is well indicated in the preamble of the Georgia measure, which said that it was passed "in order to comply as nearly as may be convenient with the act of Congress." Yet in spite of clauses antagonistic to federal law, the militia acts of four states appear to have worked satisfactorily when Washington called out bodies of the militia to put down the Whiskey Insurrection.

Revolutionary pensions granted by the states under conditions set forth by the Confederation Congress were taken over by the federal government. Because of the retrospective character of the federal act, some veterans received payments covering the same weeks from both governments. In Pennsylvania this amounted to almost a six-months bonus. States continued to pay pensions to persons not falling within Congressional classifications until in 1808 Congress instructed the Secretary of War to place on the pension list all names from state rosters.

To maintain peace with the Indians, Congress provided that cession of tribal land to the states was to be made only by treaty under federal supervision. Up to 1795 most of the states disregarded this measure and managed their own Indian affairs without consulting the federal authorities, but after that year they usually applied to the United States government for a commissioner to attend their Indian negotiations. None of the early state treaties was declared invalid; the national government usually ignored the state activities in this matter. In fact, during the period of uncertainty each government customarily went its own way and for the most part sought to avoid interference with the other. Those states which had the most contact with the Indians, were the ones which gave the least heed to the federal law. Thus New York came into conflict with the federal government several times, and Georgia, the state with the greatest expanse of Indian country, was above all reluctant to yield authority over Indians and likewise interfered most with federal agents.

Finance

The states indicated a desire to redeem the bills of credit outstanding when the Constitution was adopted, but the lack of sufficient circulating medium retarded immediate redemption, and the notes were reissued as fast as they were presented for payment. Only Massachusetts and North Carolina violated the Consti-

tution unquestionably by issuing after 1789 new bills designed to pass as money. In neither instance was the question of the rightfulness of this action carried to the courts. State bank notes, as well as the notes of the first National Bank, rapidly expanded the amount of money in circulation and eventually took the place of the old state issues. During the period of transition, the need for notes emitted by state banks was so great that apparently there was no question raised of their constitutionality. When in the 1830's the courts took cognizance of them, the practice of a generation probably influenced the decision which declared them legal.

The bills of credit in half the states had legal tender qualities when the Constitution was adopted. Three of the states repealed the provision during the first year; New York seems never to have acted, and North Carolina delayed until 1811. During the period of transition, there was uncertainty as to the status of the other kinds of tender laws in effect in some of the states; courts held certain of them valid, others not.

Three of the thirteen states were issuing copper coins in the years preceding the ratification of the Constitution, and one was preparing to do so. Before the new government was established all operations had practically ceased, so there was no problem of conforming to the constitutional provision, although the ban against state coinage undoubtedly was an important factor in the decision of the legislatures not to renew contracts or to prolong the minting. Private coinage, not prohibited by the Constitution, continued unabated until the output of the national mint became sufficient.

The lack of uniformity in the matter of coins, their fluctuating value, the absence of a monetary standard, and the hodge-podge of foreign currency in circulation contributed to the economic ills of the Confederation period. It was without much opposition therefore, that the federal government was given authority to coin money, to regulate its worth, and to fix the value of foreign currency. When the bimetallic standard was established, and values were given to gold and silver coins of specified weights, there was no opposition. Likewise, when foreign specie was evaluated, there was general acceptance. Four states repealed their laws on the subject. After the new government was established, but before the minting act had been passed, Virginia

enacted a law which set greater values on certain foreign coins than the federal government was to give them, and in fact, had given to some of them in the first customs collection act. A letter from the state treasurer, however, asking for an accounting because of the reduced assets of the treasury resulting from the changes made by Congress in the value of gold coin, indicates that Virginia must have accepted the federal provisions.

In all these measures, Congress used the dollar as the monetary unit. Although the decimal system had been adopted by the Confederation government, the states clung to their old pounds and shillings. After the adoption of the Constitution all monetary values were expressed in the new terminology; the currency coming from the federal mint bore the imprint of dollar and cent. Although the old state money in shilling denominations continued to circulate, no more was being issued. All signs pointed to the eventual adoption of the decimal standard but human nature changes slowly, and the states hesitated for some time before accepting the new system. Almost each year, however, more states were converted, and by 1800 the official adoption of the dollar and cent had become general.

Both sides of the state ledgers were affected by the ratification of the Constitution. Certain revenues were cut off; certain expenses were reduced. Assumption of state debts, as well as the settlement of accounts between the states and the federal government, further affected the balance sheets. The former explicitly reduced state indebtedness; the latter implicitly did so because the creditor states received the amount due from the federal government and the debtor states never paid the sums owed to the national treasury. By these measures, the states were rescued from a chaotic, overwhelming debit condition in 1789 and were set on a firm path toward the liquidation of their obligations.

Commerce

Even during the Confederation period there was strong sentiment favoring federal control of customs, but no other adjustment made necessary by the Constitution entailed so many difficulties. Only Delaware and New Jersey had had free trade, although Connecticut joined their ranks after ratification. The commercial interests in the other states sought to have the state

customs repealed early--March 3, 1789, was especially urged as a logical date--but the majorities in the state legislatures believed that there was no need to cut off these revenues until Congress had enacted commercial legislation. Preparations were generally made to end the local laws when the federal measure went into effect. The transition from state to federal administration of the customs, however, is shrouded in confusion. This was partly because Congress set August 1, 1789, as the date when duties were to become effective and then failed to provide for the collection machinery in time. Not until August 4 did the Senate approve Washington's first appointments to the service. More days and weeks elapsed before commissions of the appointees reached the various ports. Generally, the customs houses were opened as soon as the commissions arrived; so collections did not commence simultaneously in all parts of the Union. In a report to Congress Hamilton gave dates when the customs were organized in the various states, but evidence shows them to be only approximate; half of them are incorrect. Later, a question arose whether duties were owed upon goods which entered a port after August 1 but before the federal collector began functioning. Hamilton declared that he was obliged to collect these duties, but Congress, influenced by the arguments of merchants who in some places had had to pay state duties on the goods, relieved him of this responsibility by an express act.

The evidence indicates that state collections usually ceased on August 1, but some officials continued to assess them until the federal appointee took over. In Virginia, most customs officers ceased enforcing the state acts on the first of August as instructed by a proclamation of the governor; some, however, made no collections after July 21, when this proclamation was issued.

North Carolina ratified in November, 1789, and presumably federal duties henceforth were due. Congress was in recess, however, and until it could again meet, the administrative machinery could not be established. To March 10, 1790, when the United States took over, the state continued to enforce its tariff laws even on goods coming from other states. Because Congress was in session at the time Rhode Island ratified, a law was speedily enacted for collections there, and federal customs began without delay.

Even after state customs ceased, the legislatures had problems to take care of: outstanding duties insured by bonds had to be collected; the accounts of the former collectors had to be settled; and drawbacks on goods re-exported had to be paid. Most of the states repealed their customs acts, and those of Maryland were declared obsolete by a state court. But it appears that New York took no action at all on the subject.

In late 1789 Georgia enacted a law taxing the sale of foreign goods, and in the following year Massachusetts levied an excise tax which operated as a duty. During the eighteenth century, no other state passed a revenue measure of the type which a generation or two later would have been declared unconstitutional by the Supreme Court.

The interest Hamilton took in the expired state customs laws and the methods used to enforce them, suggests that a study might profitably be made of the states as laboratories whose experiments in administration proved to be of service to the federal government in 1789, just as the states' constitutional experiments were valuable to the Philadelphia Convention.

By the Constitution the states may, however, levy such import and export duties as are necessary to enforce their inspection laws. Little change was made in these laws as a result of the new frame of government. Some revenue beyond the cost of enforcement was very probably realized and this went into the state treasuries in spite of the constitutional provision that surpluses were to go to Congress. Enforcement was difficult when the corps of state customs officers was discontinued, but soon the federal collectors were instructed by Congress to heed and to enforce state inspection laws. Similarly, quarantine and health laws were difficult to execute until federal assistance was forthcoming in 1799; and fees charged for health inspection probably yielded a surplus which the states retained.

Congressional control over the regulation of foreign and interstate commerce was not considered exclusive during the transitional period. Port regulations and fees, as well as charges for harbor improvements were common. The consent of Congress, as provided for in the Constitution, was sought and secured for some of these, but many others were enforced without federal permission. Head money on persons arriving by sea and measures banning the slave trade are two other types of state laws which

affected the flow of commerce, but to which no objections seem to have been raised. State pilot laws also affected shipping, but in 1789 after Congress ordered that pilots be regulated in conformity with state laws, there could be no question as to their validity. State pilot administration and the federal customs service exhibited striking co-operation in several instances during the period.

International and Interstate Relations

The states continued to show concern over international matters after the adoption of the Constitution and sought to influence the course the federal government might take in foreign affairs, but they generally acknowledged the constitutional limitations of their powers and abided not only by the foreign relations clauses of the Constitution, but conformed as well to the spirit of the federal arrangement. Even in deviations from the normal, the subject matter was usually on the border-line between external affairs and some phase of the state police power, and in no instance were federal negotiations or the international relations of the country put into jeopardy.

The interstate comity clauses of the Constitution emphasize the national aspects of the Union created. One of these required that the judgments and records of each state be given full faith and credit in the other states. State courts usually gave the clause a narrow construction at first, but the possibility of appeal to the federal judiciary soon made it effective. The other, granting citizens of a particular state all the rights and privileges of the citizens of the state to which they might come, was also timidly construed at first; but with few exceptions, the legislatures refrained from passing laws differentiating between their own citizens and those of other states.

Naturalization and citizenship were knotty problems largely because of the failure of the Constitution to define citizenship and because of the phrasing of the clause granting Congress power to prescribe a uniform mode of naturalization. To many persons the clause meant that the states could continue to naturalize according to the methods set forth by Congress and that the alien would become a state citizen by the process. To others, federal citizenship was the result of naturalization, and residence alone determined state allegiance. That Congress itself

was perplexed is seen in the second naturalization act which promised that by conforming to the law an alien would "be admitted to become a citizen of the United States, or any of them." In providing qualifications for holding certain offices state constitutions frequently required state and federal citizenship of different lengths of time, but the term is used haphazardly and furnishes no key to the puzzle.

After Congress set forth the mode for naturalization, the states gave no indication that they thought the power was exclusive. Their general laws were continued, and private acts were passed in large number. At first the federal courts ruled the power to be concurrent then side-stepped the issue, and finally held it to be exclusively federal. Congress declared in 1795 that the mode it set forth was to be the only one whereby an alien could become a citizen (whether state or federal is indefinite), but individuals continued to make use of state laws. There is some indication that occasionally, and in some places, it was understood that this state-naturalization conferred only local, not federal, citizenship; but it must be noted that the comity clause conferring privileges refers to state citizens, and it could be argued that naturalization according to state rule secured these prerogatives. If this was so, an alien could gain citizenship privileges in all the states by conforming to the rules set up by the state with the most lax laws. In Virginia an alien having been naturalized in the federal mode assured the governor that he would immediately comply with the commonwealth's requirements so as to secure state citizenship. Perhaps it was possible that each kind of citizenship could be secured without the other, and naturalization by one mode did not make the other unnecessary. It seems doubtful, however, whether aliens, citizens, legislatures, or jurists could have clarified the situation as it existed in the 1790's. By 1800 fewer and fewer state naturalizations were taking place so the confusion was lessening.

There were few cases of foreign extradition during the period of transition. One informal surrender to a British sea captain of a sailor charged with mutiny greatly aroused Virginia on whose soil the rendition took place. On the other hand, there was a good deal of interstate extradition. Usually the request for the return of a fugitive found a co-operative response, but in two overlapping cases Virginia steadfastly refused to comply

with Pennsylvania requisitions. Constitutional arguments put forth by Virginia resulted in Congressional enactment of a law providing the method by which the process would take place. More important, the refusal indicated that if a state was unwilling to surrender a fugitive, the rendition clause in the Constitution was not sufficient to coerce it.

Although no important controversies over the returning of fugitive slaves occurred during the transitional period, New England in two instances indicated its future course in making the Fugitive Slave Law a dead letter.

Under the Constitution the states gave up their power to make war and to settle their differences by the use of force. As a substitute, the document provided that disputes might be brought into a federal court for adjudication. During the 1790's no issue between the states was settled in this manner, although in the last year of the decade New York instituted a suit against Connecticut for this purpose. Another method of settling interstate controversies was by negotiation leading to a compact which required the consent of Congress. Several compacts were drawn up before 1800, notably those between New York and Vermont and between Virginia and Kentucky by which the fourteenth and fifteenth states were admitted into the Union.

Miscellaneous

Most of the states had enacted copyright laws between 1783 and 1786. Similar one to another they served as a model for the federal act passed in 1790. Presumably the state laws remained effective since they were included in compilations printed even into the nineteenth century. Almost all the states which repealed their laws did not do so until several years after 1789 had elapsed; New Hampshire waited until 1842. The question as to whether these measures continued in force or became obsolete upon the adoption of the Constitution is, however, only academic; in practice they probably had little effect. Authors undoubtedly registered their titles at the federal district court in their own states so as to enjoy national protection rather than by the same effort to secure only state-wide rights.

In the matter of patents, however, inventors continued to apply to the states for several years after Congress had made provisions on the subject. The local governments which granted

the right by private act, frequently gave better terms. Furthermore, federal patents at first involved the examination of each application in cabinet meetings. But by 1800, state patents became less and less frequent, and inventors were turning to the federal government in increasing numbers.

From the beginning, the post office policy of the United States was based on the extension of the service, even when at the expense of revenue. To balance the deficits incurred on routes through sparsely settled territory, however, it was desirable that every possible penny should be derived from the more profitable eastern post roads. Hence, in 1792 Congress forbade any competitive carrying of mail where it might cause a diminution of federal revenue. This forestalled state or individual competition along established post roads. It did not prevent New Hampshire from establishing a postal service in the interior of the state where there were no federal routes. This state post office, which is ignored in almost every postal history, was never formally discontinued, but probably was reduced piece-meal as the federal service was expanded in the state. There was definite interference on the part of two states with the federal carrying of the mail: New Jersey charged a license fee for stages, and Maryland granted a monopoly. To federal objections neither state yielded, but there was no attempt at coercion.

In the matters of both standards of weights and bankruptcy provisions, Congress failed to implement constitutional clauses although urged to do so by the states. As a result, state laws remained in effect. In the case of measurements, the standards of the states were very similar, having a common ancestry; but in the case of bankruptcy laws, provisions varied greatly. Recognizing the practice which had developed for a generation, the Supreme Court in 1827 upheld the right of states to pass bankruptcy laws in the absence of action by Congress.

Two minor measures taken in 1789 by the federal government serve to indicate the general spirit of co-operation manifested at most times by the states. Some governors appear to have supervised and instructed the marshals who were assigned the task of taking the first census, but no evidence could be uncovered of obstruction or opposition to this federal activity in spite of the fact that Congress went beyond the constitutional requirement of a simple enumeration. Likewise, in only a single

instance does it appear that objection was raised to Washington's first Thanksgiving proclamation. Many governors and a few legislatures fortified it by ordering that the day be observed in their states.

Ten of the amendments culled by Madison from those submitted by the ratification conventions were promptly approved by a sufficient number of states to become part of the Constitution. With exceptions, opposition came from Anti-Federalists. There was general realization that adoption of these amendments would forestall consideration of more radical changes. Three states--Georgia, Massachusetts, and Connecticut--failed to ratify. In the two New England states the upper and lower houses favored affirmative action on most of the twelve submitted; but disagreement over one or two resulted in a deadlock on all. The evidence seems to warrant the conclusion that the rapid ratification indicated the general willingness of the states to try out the new document much as it came from the convention.

Although the Constitution permits each house of Congress to make its own rules, the states consistently sought by adopting resolutions to cause the Senate to change its practice of sitting at all times behind closed doors. Ignoring the pressure at first, the Senate finally relented, and in 1794 its doors were thrown open whenever legislative business was under discussion.

Throughout the transitional period, the state legislatures instructed their senators to take specific action on public questions before Congress. Based on the theory that the members of the federal upper house were agents of the state and hence subject to the legislature's control, this practice was exercised at some time or other by all the states. When early in the nineteenth century, however, Virginia proposed an amendment making it compulsory for a senator to obey instructions, the resolutions of disapproval passed by several states, and the general apathy of the others make clear that the theory had already waned. But even during the period of transition, this means by which the states might have dominated the federal government was never fully effective.

Personnel

That the adoption of the Constitution had far-reaching effects on the civil service of the states is obvious. Some state

offices were abolished by its terms; others found their functions so reduced that they could be discontinued; furthermore, the federal government would compete with the states for the service of able citizens in the future.

The charge raised during the ratification controversy that office-holders and those who had control of appointments were at the center of opposition to the plan of government seems valid on the surface; they must have realized that large powers would be taken from them. Careful investigation, however, failed to produce any proof to substantiate these charges. An insignificant handful of office-holders were first- or even second-line Anti-Federalists, and as many of them were Federalists. New York and Rhode Island were the only states where Anti-Federalists occupied most of the offices which came to an end upon the adoption of the Constitution.

The retention of office was considered by many to be almost a property right. Washington himself gave support to the concept that state officers who had behaved well ought to be given preference in federal appointments to similar positions. In addition, the President considered other qualifications: fitness for office, geographic distribution, war service, and friendship for the Constitution. This last mentioned quality has been generally considered by writers of the period to have been very important, but an examination of the political leanings of the federal appointees indicates that it can be greatly over-emphasized.

The retention of state officers in the newly created federal posts was especially the rule among the minor positions such as those of the lighthouse-keepers. Likewise, almost all of the officers employed by the Confederation government were given appointment. But only two judges and two marshals of the discontinued state admiralty courts received federal commissions. Washington gave prime consideration to fitness in judicial appointments and probably decided that he would have been too limited in his range of choice if he had attempted to place in judicial positions all those judges who were unemployed as a result of the Constitution's adoption. It would appear that the lesser officers of the admiralty courts lost out, because in filling the positions which were similar in the federal district courts Washington remembered his Revolutionary comrades.

A majority of the state customs officers was retained.

Almost all those of first rank at the main ports were continued in office; but there were severe casualties among the customs officers of second rank, especially at the minor ports. All New York collectors and assistants were charter members of the most important post-ratification Anti-Federalist organization; yet all received federal appointment, while only two of the six officers in Federalist Connecticut were retained. The single Delaware collector was passed up. Political beliefs perhaps were given consideration by Washington when making customs appointments, but certainly they were not accorded undue weight.

CONCLUSION

The Constitution went into effect March 3, 1789, but on that day it was only a promise--a plan for the conduct of public affairs. Its provisions had to be interpreted, and many required execution. The preceding pages suggest the confusion in the minds of local leaders as to the meaning of the constitutional clauses and as to the duties of the states under the document. Few generalizations broad enough to apply to all the states can be formulated. The thirteen local governments molded their behavior toward the Constitution and the federal government according to their own individual interpretation of the constitutional provisions. Neither precedent nor the Supreme Court furnished guidance.

The question may be logically raised as to whether the diverse, irregular action of the states is significant in the constitutional history of the nation. In reply, three points can be made. The first has already been suggested:¹ almost every federal law implementing the Constitution required either local cooperation or the curtailment of a state activity. The first act of Congress which obliged state officers to take an oath to support the Constitution was but a pious hope until the officers complied. Federal operation of the lighthouses was but a promise until these were ceded by the states. Transgressors against federal law could not be confined until the states granted the use of their jails. Congress could not even meet until the states had provided for elections to be held. More obvious is the fact that many state laws had to be amended and frequently even repealed before the Constitution could become effective; a by no means exhaustive list would include those having to do with paper money, coinage, legal tender, admiralty jurisdiction, Indian affairs, customs, inspection, foreign affairs, copyright, patent, and naturalization.

The second significant point is the freedom from federal interference enjoyed by the states in making the necessary adjustments. The student of constitutional history today is tempted time and again to label as unconstitutional activities in which the states engaged immediately after 1789. But seldom did the

¹Supra, pp. 1, 4.

Federalist-controlled central agencies charge the state governments with unconstitutional conduct during the transitional period.¹ A federal circuit court declared a Rhode Island stay-law void; Virginia and Connecticut laws violating the 1783 treaty provisions were held invalid; but these are exceptions. In fact, close examination reveals that the states were given a free hand, that what might have been called unconstitutional was allowed to pass unchallenged. Massachusetts and Georgia enacted laws taxing imports; many states continued to maintain and to garrison forts; New York and Georgia, especially, persisted in managing their own Indian affairs; Rhode Island, Pennsylvania, and Virginia disposed of certain problems of a diplomatic nature; all the states chartered banks conveying the right, denied to them, of issuing bills of credit; most of the states naturalized aliens in a manner different from the uniform method prescribed by Congress. In the state legislative debates there were frequent arguments as to the constitutionality of these undertakings, but the federal authorities permitted the states wide latitude; there was no John Marshall on the Supreme Court bench vigorously pronouncing certain powers delegated to the federal government to be exclusive.

The free hand given the states by the federal government to make or not to make adjustments to the new plan of government resulted in the third and perhaps most significant contribution to constitutional history. Many of the policies adopted by the states during the transitional period became precedents for future action, and, in time, they became part of the national constitutional law. The tenet that banks chartered and even owned by a state might issue bills of credit originated not in the Supreme Court or by Congressional pronouncement; it was the adjustment made by the states in the 1790's to reconcile the lack of sufficient circulating medium and the prohibition against the states issuing paper money. Justice Story admitted as much when he said that although the Supreme Court might be in error for permitting a state-owned bank to do what the state could not do, long practice forestalled adoption of the opposite view.² Although the Constitution specifically provided that federal jurisdiction over ceded areas was to be "exclusive," Massachusetts qualified the

¹Much more frequently did the states make this charge against federal activities.

²Commentaries, pp. 55, 56, 225-27.

extent of the jurisdiction granted in her first lighthouse cession. Other states followed this precedent. In time, Congress accepted the qualification. Finally, the Supreme Court faced with a situation dignified by long practice, determined that it was within the meaning of the Constitution for a state to reserve part of the jurisdiction. The preceding pages note many other instances of practices inaugurated by a state or a group of states in the 1790's which in later years were accepted as proper state functions although they might conceivably have been termed unconstitutional.

The adjustments by the states to some forty-five problems created by the new plan of government reveal another fairly prominent thread in the pattern of constitutional development. The indulgence of the federal government was matched by the general compliance of the states to the spirit of the Constitution. Although examples of failure to conform to individual clauses is conspicuous in the preceding pages, closer examination reveals that the "unconstitutional" action was motivated not so much by disloyalty to the system as by misinterpretation and impracticalities. Outward loyalty to the Constitution was general after ratification,¹ but the history of the states indicates that more than lip-service was paid to the new government. The Anti-Federalists of 1787 and 1788 might not have been regenerated; they might not have become staunch supporters of the document; but if their strength in the various states has been correctly gauged, they did not attempt to defeat the plan by any systematic disobedience. So-called Federalist states, as well as so-called Anti-Federalist states, from time to time refused to abide by what seems a perfectly clear constitutional requirement. An attempt to discover which states were the most reluctant to make the constitutional provisions effective led nowhere. Virginia and Massachusetts more frequently than other commonwealths adopted what might be called an Anti-Federalist attitude, but their margin over the rest of the states is by no means significant. And in all the states, refusal to obey constitutional precepts was seldom based on principle. The reasonable conclusion to be drawn is not that continued Anti-Federalism within the states resulted in disregard of constitutional clauses, but that honest disagreement over interpretation and questions of expediency determined the actions taken by the states.

¹See Beard, Economic Origins of Jeffersonian Democracy, pp. 93f.

If the policies of Hamilton and the Federalists had been put into effect without opposition and compromise, the importance of these state activities might not have been so great. But the dominant note in national affairs during the period the new government was organized--as well as in later years--was conflict and compromise. Under such circumstances the local point of view, the interpretations of the Constitution prevalent in the thirteen states, increase in significance. The adjustments or the lack of adjustments within each state underlie and explain the meaning of the conflicts in Congress.

The state attitudes are influential throughout American history, but especially so during the period of transition. Since state accommodation was necessary for the successful realization of the "more perfect Union," Congress and the other federal departments had to understand and to give heed to the opinions and susceptibilities of state leaders. Federal coercion of state officers to effect compliance was lacking probably not because of mere accident; it is questionable if federal insistence upon strict obedience to all clauses of the Constitution would have succeeded. The doctrines of Hamilton had to await a later day before they could be uttered effectively by a chief justice of the Supreme Court.

The plan of the framers of the Constitution was to set up a government which would operate on the individual rather than on the states. Their success can best be measured by the degree of popular acceptance of federal enactments and administration. The acquiescence of the people to the new order can be determined to an extent, perhaps, by the views expressed in Congressional debate and by the lack of organized opposition to federal measures.

But another and probably more accurate measuring stick is first, the agency to which the people turned for a solution of their needs, and second, the response of the state legislature to the public opinion.

In 1790, the federal government was not fully acting on the individual. The inventor still turned to the state for a patent, the alien for naturalization, and the slave owner for the return of his property; the politician preferred state to federal service. The states reflected the public opinion; they continued to exercise most of the powers delegated to the federal government on the plea that the grants were not exclusive.

During the decade of the 1790's, conditions changed.

Aliens and inventors began turning more often to the federal government. The states responded to the shifting attitude; steadily they relinquished essentially federal functions. State forts were ceded; Indian management was given up; federal monetary units were accepted; the assistance of the federal government in enforcing inspection and quarantine laws was even sought; New Hampshire gave up her post office; pressure was exerted on the federal government to take over all, not merely part, of the Revolutionary pensions.

By 1800, the transition from the government of the Confederation operating on the states to the government of the Constitution operating on the individual was practically complete.¹ The influence of the federal government on the individual had supplanted that of the state in several fields, coincidental with the coming of Jeffersonian Democracy, which theoretically, at least, emphasized local government.

¹Worthy of consideration is the question of whether historians setting 1815 as the beginning of American nationalism might not be guilty of a fifteen-year lag, at least as far as concerns domestic issues.



